S. Bent & Brothers and Samuel Bent LLC *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 154, AFL–CIO a/w Communication Workers of America.

Samuel Bent LLC *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 154, AFL-CIO a/w Communication Workers of America. Cases 1–CA–37851, 1–CA–37988, and 1–CA–38328

October 1, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On March 2, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Samuel Bent LLC (Samuel Bent) filed cross-exceptions and a supporting brief.[1] The General Counsel and Samuel Bent each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] except as modified below, and to adopt the recommended Order[4] as modified and set forth in full below.

1. The judge found that the Respondent Samuel Bent is a perfectly clear successor to Respondent Bent within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). He found further that Samuel Bent did not have sufficient grounds to support a good-faith doubt that the Union retained the support of a majority of unit employees after the transition and, consequently, it violated Section 8(a)(5) and (1) of the Act when it failed and refused to recognize and bargain with the Union and implemented unilateral changes in terms and conditions of employment. Alternatively, the judge found that Samuel Bent could not have lawfully refused to recognize the Union even if it held a good-faith doubt that the Union retained majority support, under the Board's rationale in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). We agree with the judge, and we adopt and elaborate on his reasoning as follows.

There is no longer any dispute that Samuel Bent was a *Burns* successor to Bent, as Samuel Bent has not excepted to this finding. Samuel Bent was therefore obligated to recognize and bargain with the Union concerning the terms and conditions of employment of unit employees. Samuel Bent claims that it refused to recognize the Union after receiving information that raised a doubt that the Union continued to represent a majority of unit employees after the transition. To support its purported doubt, Samuel Bent relies on the statements of six to eight employees that the Union was not important, the statement of one employee that he did not need the Union anymore, the statement of another employee that he did not care about the Union, and the failure of a majority of employees to authorize dues check-off.

We agree with the judge that the factors relied on by Samuel Bent are insufficient to support a good-faith doubt that the Union retained the support of a majority of unit employees. As the judge noted, the comments by employees that the Union was not important right now compared to their jobs were not negative and were limited to the immediate concern of retaining their jobs after the sale of the business to Samuel Bent. While two other employees made arguably negative statements regarding the Union, those employees did not purport to represent the sentiments of the approximately 54 other employees at the time. Further, it is well settled that a low percentage of employees using dues check-off does not establish that those employees do not want the union to be their collective-bargaining representative. *Henry Bierce Company*, 328 NLRB No. 85, slip op. at 4 (1999), enfd. in relevant part and remanded 234 F.3d 1268 (6th Cir. 2000); and *Petroleum Contractors*, 250 NLRB 604 (1980), enfd. 671 F.2d 496 (3d Cir. 1981).

In *Levitz*, 333 NLRB No. 105 (2001), which issued subsequent to the judge's decision, the Board overruled the "good-faith doubt" standard and held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." Slip op. at 1. The Board further held, however, that it would not apply the new standard in cases

[1] No exceptions were filed by Respondent S. Bent and Brothers (Bent).

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's conclusions of law to conform to his findings.

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (August 24, 2001).

pending when *Levitz* issued, such as the case here. Id., slip op. at 12. Accordingly, in the present case, we have applied the good-faith doubt standard in the manner that it has been interpreted by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). The Supreme Court in *Allentown Mack* held that the "good-faith doubt" standard must be interpreted to permit an employer to act where it has a "reasonable uncertainty" of the union's majority status, so that the test could be phrased in terms of whether the employer "lacked a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees." Id. at 367. We agree with the judge that Samuel Bent's asserted basis for its refusal to recognize the Union fails to meet the requisite test: a "genuine, reasonable uncertainty about whether [the Union] enjoyed the continuing support of a majority of unit employees."

We further agree with the judge that Samuel Bent's refusal to recognize the Union would be unlawful even if it could show that the refusal was grounded on a good-faith doubt that the Union continued to have majority support. In *St. Elizabeth Manor, Inc.*, supra, the Board returned to the principle expressed in *Landmark International Trucks*, 257 NLRB 1375 (1981), enf. denied 699 F.2d 815 (6th Cir. 1983), that a successor employer violates Section 8(a)(5) if it withdraws recognition before a reasonable period of time for bargaining has elapsed. In *Inn Credible Caterers, Ltd.*, 333 NLRB No. 110 (2001), which issued subsequent to the judge's decision, the Board explained that under the holding in *St. Elizabeth Manor*, once a successor employer's obligation to bargain attaches, a union is entitled to a reasonable period of bargaining without challenge to its majority status—whether through a decertification effort, election petitions, or employer claims of union loss of majority support or good-faith doubt as to that majority status. Id. slip op. at 1. In this case, a reasonable period for bargaining clearly had not elapsed when Samuel Bent refused to recognize the Union based on an alleged good-faith doubt of the Union's continuing majority status.

Based on the above, we conclude, in agreement with the judge, that Samuel Bent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by implementing unilateral changes in unit employees' terms and conditions of employment.[5]

2. We further agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), and *Williams Enterprises*, 312 NLRB 937 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), that an affirmative bargaining order is warranted in this case as a remedy for Samuel Bent's unlawful refusal to recognize and bargain with the Union. We adhere to the view, reaffirmed by the Board in *Caterair*, that such an order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." 322 NLRB at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by Samuel Bent's unlawful refusal to recognize and bargain with the Union. In contrast, the affirmative bargaining order and its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations.

Samuel Bent never recognized or bargained with the Union after the transition, despite repeated demands by the Union. Moreover, Samuel Bent unilaterally implemented a health insurance plan and modified vacation

[5] Samuel Bent argues that the issue of its refusal to bargain is moot because it ceased business operations on February 2, 2001, after defaulting on its loan obligations. According to Samuel Bent, its lender has taken over its plant and inventory. It is well settled, however, that mere discontinuance of business does not moot allegations of unfair labor practices against a respondent. See, e.g., *Redway Carriers, Inc.*, 301 NLRB 1113 (1991) (issuing affirmative bargaining order and directing make-whole remedy despite finding that respondent was defunct). Accordingly, we find no merit in Samuel Bent's argument that the issue of its refusal to bargain is moot.

policies. These actions clearly signal to employees Samuel Bent's continuing disregard for their bargaining representative and would likely have a long-lasting effect.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition or by Samuel Bent's withdrawal of recognition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charge and issuance of a cease and desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Samuel Bent's violations because it would permit a decertification petition to be filed before Samuel Bent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such result would be particularly unfair in circumstances such as those here, where Samuel Bent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation.

Finally, the successor bar rule adopted in *St. Elizabeth Manor* effectively provides the same reasonable period for bargaining here as would an affirmative bargaining order.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

3. The judge found that Samuel Bent could not be held liable as a successor under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), for unremedied unfair labor practices committed by Bent, because it did not know at the time it purchased Bent's assets that unfair labor practice charges had been filed by the Union. We disagree.

Preliminarily, the fact that Samuel Bent did not know of the unfair labor practice charges filed by the Union does not preclude a finding that it is a *Golden State* successor. In *Golden State* the Court held that one who acquires and operates a business in basically unchanged form, under circumstances that charge him with notice of an outstanding Board order against his predecessor, can be held responsible for remedying his predecessor's unlawful conduct. The issue was not raised in *Golden State*, and therefore the Court did not pass on, whether knowledge of unfair labor practices of a predecessor would be sufficient to hold a successor liable, absent a formal charge. However, the Board and courts have since determined that the public policy reasons underlying the decision in *Golden State* apply in such circumstances.[6] Thus, in determining whether a successor had notice of its potential liability, the Board does not consider whether the successor has seen the particular charges or complaints, but rather, whether the successor was aware of conduct that the Board ultimately found unlawful. *Robert G. Andrew, Inc.,* 300 NLRB 444 (1990); *NLRB v. St. Mary's Foundry Co*., 860 F.2d 679, 681-682 (6th Cir. 1988)[7]; and *Cumberland Nursing & Convalescent Center*, 263 NLRB 428, 434 (1982). Responsibility for establishing that a successor was without notice of its predecessor's unfair labor practices rests with the successor. *Robert G. Andrew, Inc.,* supra; and *Blu-Fountain Manor*, 270 NLRB 199, 210 (1984), enfd. sub nom. *NLRB v. Jarm Enterprises*, 785 F.2d 195 (7th Cir. 1986). We find that Samuel Bent has not carried that burden.

The unfair labor practices committed by Bent consisted of unilaterally terminating unit employees' medical, dental, and vision plans; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and the section 125 plan. The record shows that before Samuel Bent acquired Bent's assets, Samuel Bent was aware, through its owner and president Hamburg, of the existence of the collective-bargaining agreement and the provisions of that agreement requiring Bent to provide a medical plan

[6] Regarding the public policy underlying its decision, the Court stated

> Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by Section 7 of the Act, and protection for the victimized employee-all important policies subserved by the National Labor Relations Act-are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."

414 U.S. at 184–185 (citing *Perma Vinyl Corp*., 164 NLRB 968, 969 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[7] The court in *St. Mary's Foundry* also stated that, in addition to awareness of the conduct itself, "appreciation of the significance of the predecessor's conduct" is a key factor in determining successor liability under *Golden State*. 860 F.2d at 682. As explained below, we reject Samuel Bent's argument that it lacked an appreciation of the fact that Bent's termination of the medical, dental, and vision plans could constitute an unfair labor practice.

and a dental plan. Samuel Bent was also aware that Bent had been providing its employees with a vision plan, group term life insurance, group term accidental death and dismemberment insurance, long-term disability insurance, and a section 125 plan. Before acquiring Bent's assets, Samuel Bent learned that Bent had terminated the medical, dental, and vision plans. Samuel Bent argues, however, that it was not aware of the circumstances of the termination of the medical, dental, and vision plans, including whether or not Bent bargained with the Union before terminating the plans, and it therefore lacked an appreciation of the fact that Bent's termination of the plans could constitute an unfair labor practice. We are not persuaded by that argument.

The Board has long held that a successor which takes over a business with actual or constructive knowledge of conduct amounting to an unfair labor practice can be held liable to remedy the unfair labor practice. *Brook Farm Foods, Inc.*, 101 NLRB 1486, 1487 (1952); and *The L.B. Hosiery Co.,* 88 NLRB 1000 (1950), enfd. 187 F.2d 335 (3d Cir. 1951), cert. denied 347 U.S. 976 (1954). The concept of constructive knowledge incorporates the notion of "due diligence", i.e., a party is on notice not only of facts actually known to it but also facts that with "reasonable diligence" it would necessarily have discovered. *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). Thus, while a successor employer is not required to aggressively investigate its predecessor in order to meet the reasonable diligence standard, it cannot with impunity ignore its predecessor's noncompliance with a collective-bargaining agreement, as Samuel Bent in this case did, and then rely on its ignorance to argue that it was not on notice of the predecessor's unfair labor practices. Here, Samuel Bent was on notice of the existence of the collective-bargaining agreement, of its provisions for medical and dental plans, of the fact that Bent had also been providing employees with a vision plan, and of Bent's termination of all three plans. Reasonable diligence required Samuel Bent to inquire as to whether Bent had bargained with the Union before terminating these plans. Therefore, we find that Samuel Bent knew, or reasonably should have known, that Bent had terminated the unit employees' medical, dental, and vision plans in violation of Section 8(a)(5) and (1) of the Act. See *South Harlan Coal, Inc.*, 844 F.2d 380, 386 (6th Cir. 1988) (evidence supported the finding that successor "had knowledge, or reasonably should have known" of predecessor's unfair labor practices; successor was therefore liable under *Golden State*).

We further find that Samuel Bent knew or should have known that Bent had terminated the group term life insurance, group term accidental death and dismemberment insurance, long-term disability insurance, and section 125 plan in violation of the Act. Through its due diligence investigation, Samuel Bent knew that Bent had been providing its employees with each of these benefit plans, as well as the medical, dental, and vision plans. Samuel Bent also knew that Bent had terminated the medical, dental, and vision plans. Reasonable diligence required Samuel Bent to inquire whether Bent had terminated any other benefit plans, and if so, whether Bent had bargained with the Union first. Therefore, we find that Samuel Bent knew, or reasonably should have known, that Bent had terminated the group term life insurance, group term accidental death and dismemberment insurance, long-term disability insurance, and section 125 plan in violation of Section 8(a)(5) and (1) of the Act.[8]

We further find that other factors support finding Samuel Bent to be a *Golden State* successor. The determination of whether a successor is obligated to remedy its predecessor's unfair labor practices involves a balancing of "the conflicting legitimate interests of the bona fide successor, the public, and the affected employee[s]." 414 U.S. at 181. The balancing process includes an emphasis on protection for the victimized employee, who may be "without meaningful remedy when title to the employing business operation changes hands." Ibid. (citing *Perma Vinyl Corp*., 164 NLRB at 969). Guided by these principles, we find that the interests of the public and the victimized employees in this case are best served by requiring Samuel Bent to remedy the unfair labor practices of its predecessor, Bent.[9] Further, it does not work an undue hardship on Samuel Bent. As the Board observed in *Perma Vinyl*, the successor who has taken over control of the business is generally in the best position to remedy unfair labor practices effectively. 164 NLRB at 969. Moreover, when Samuel Bent substituted itself in the place of Bent, it became the beneficiary of Bent's unremedied unfair labor practices. Finally, since Samuel Bent had notice of Bent's unfair labor practices, its potential liability for remedying the unfair labor prac-

[8] In the absence of record evidence that Samuel Bent knew of Bent's termination of the group term life insurance, group term accidental death and dismemberment insurance, long-term disability insurance, and section 125 plan, Member Truesdale would not find Samuel Bent jointly and severally liable under *Golden State* for Bent's termination of those plans in violation of Section 8(a)(5) and (1) of the Act. Thus, Member Truesdale does not agree with his colleagues that reasonable diligence required Samuel Bent, upon learning that Bent had terminated the medical, dental and vision plans, to inquire whether Bent had terminated any other benefit plans, and if so, whether Bent had bargained with the Union first.

[9] Interests of the public which must be weighed include avoidance of labor strife and prevention of a deterrent effect on the exercise of Section 7 rights which may occur if victimized employees find themselves without remedy. 414 U.S. at 184–185.

tices is a matter which it could have reflected in the price it paid for the business. 414 U.S. at 184–185 (quoting *Perma Vinyl,* supra).

In this regard, Samuel Bent contends that the rationale stated in *Golden State* and *Perma Vinyl* for imposing liability on a purchaser for the unfair labor practices of the seller—that the purchaser can reflect its potential liability in the negotiated purchase price or through indemnification by the seller—is missing in this case. Samuel Bent purchased the assets of Bent from Wells Fargo and First International Bank in a secured private party transaction for approximately $2,284,000 dollars. According to Hamburg, that price, which was the amount of the banks' outstanding loans to Bent plus several hundred dollars, was not negotiable. Samuel Bent contends, therefore, that it should not be required to remedy Bent's unfair labor practices, as it had no opportunity to insulate itself from liability. We do not agree.

As discussed, the *Perma Vinyl* rationale adopted by the Court in *Golden State* for holding a purchaser responsible for the seller's unfair labor practices is predicated on the purchaser's ability to reflect the potential liability in the negotiated purchase price or through indemnification by the seller. 414 U.S. at 185. Thus, the Board has held that some pecuniary or security interest, or other "clearly identifiable and connecting interest" between the predecessor and the successor, is critical to establish a *Golden State* successorship. *Glebe Electric, Inc.*, 307 NLRB 883, 886 (1992). Moreover, even where a business relationship or other "clearly identifiable and connecting interest" is found to exist, the Board will examine the nature of the relationship to determine if the purchaser could have effectively negotiated a method of insulation from liability for the seller's unfair labor practices. Generally, if the purchaser had no opportunity to insulate itself from liability, no *Golden State* successorship will be found. *Hill Industries, Inc.,* 320 NLRB 1116 (1996).

We find that there was a business relationship, or "clearly identifiable and connecting interest," between Samuel Bent and Bent. Bent remained, through the sale, a viable corporate entity, and its assets, although sold through Wells Fargo and First International, were still Bent's assets, not the banks' assets. Further, there was nothing in the nature of the transaction to indicate that Samuel Bent could not have effectively negotiated a method of insulation from liability for Bent's unfair labor practices. That Samuel Bent purchased the assets in a secured private party sale through the banks is not, in itself, dispositive of this issue. Nor is Hamburg's testimony that the banks were unwilling to negotiate dispositive, particularly considering that the record contains no evidence that Hamburg ever requested a lower price from the banks. Furthermore, the price fixed by the banks and paid by Samuel Bent was approximately $2,284,000. This price reflected the amount of Bent's indebtedness rather than the actual value of the assets. While the record does not indicate their value, less than 2 months before purchasing Bent's assets through the banks, Hamburg offered to purchase the assets directly from Bent for approximately $4,500,000. Thus, by purchasing the assets from the banks instead of Bent, it received a reduction in price well in excess of the liability for Bent's unfair labor practices. Contrary to Samuel Bent, we do not think that imposing liability in these circumstances imposes an undue hardship on Samuel Bent.[10] Nor do we think that it will have the effect, as Samuel Bent argues, of "chilling investor's ardor for purchasing failing companies and saving jobs." Accordingly, we reverse the judge and find that Samuel Bent is a successor under *Golden State*, jointly and severally liable with Bent for remedying Bent's unlawful termination of the employee benefit plans.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4:

"4. Respondent Bent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) by terminating the medical, dental, and vision plans; group term life insurance; group accidental death and dismemberment insurance; long-term disability insurance; and section 125 plan."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, S. Bent & Brothers, Gardner, Massachusetts, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unilaterally and without notice to the Union terminating the medical, dental, and vision plans; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and the section 125 plan.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Samuel Bent LLC, reimburse unit employees for any expenses ensuing

[10] As the Board and courts have recognized, successorship is an equitable doctrine. Consequently, fairness is a prime consideration.

from Respondent S. Bent and Brothers' unlawful termination of the medical, dental, and vision plan; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and section 125 plan, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, mail signed and dated copies of the attached notice marked "Appendix A"[11] to the Union and to all unit employees employed as of January 19, 2000. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be mailed at the Respondent's expense to the last known address of each employee.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Samuel Bent LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 154, AFL–CIO a/w Communication Workers of America, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent Samuel Bent at the Gardner, Massachusetts facility, excluding all other employees, office and clerical employees, firemen and employees of the research and development department, executives, guards and supervisors as defined in the Act.

(b) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(b) On request of the Union, rescind the unilateral changes in vacation policies and health insurance, and make the employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. Further, the Respondent shall reimburse unit employees for any expenses ensuing from the unlawful conduct, as set forth in *Kraft Plumbing & Heating*, supra, such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

(c) Jointly and severally with Respondent S. Bent and Brothers, reimburse unit employees for any expenses ensuing from Respondent S. Bent and Brothers' unlawful termination of the medical, dental, and vision plans, group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and section 125 plan, as set forth in *Kraft Plumbing & Heating*, supra, such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Gardner, Massachusetts facility copies of the attached

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice marked "Appendix B".[12] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 1, 2001

Wilma B. Liebman, Chairman

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally terminate the medical, dental, and vision plans; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and the section 125 plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with Samuel Bent LLC, reimburse unit employees, with interest, for any expenses ensuing from our unlawful termination of the medical, dental, and vision plans; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and the section 125 plan

S. BENT & BROTHERS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with International Union of Electronic, Electrical, Salaried, Machine And Furniture Workers, Local 154, AFL-CIO a/w Communication Workers of America as the exclusive collective-bargaining representative of employees in the following appropriate unit.

All production and maintenance employees employed by Respondent Samuel Bent at the Gardner, Massachusetts facility, excluding all other employees, office and clerical employees, firemen and employees of the research and development department, executives, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other conditions of employment without bargaining about these changes with the Union.

[12] See fn. 11, supra.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and on request, bargain collectively with the Union as the exclusive representative of our employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL, on request of the Union, rescind our unlawful unilateral changes in terms and conditions of employment, and WE WILL make employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

WE WILL, jointly and severally with S. Bent and Brothers, reimburse unit employees, with interest, for any expenses ensuing from S. Bent and Brothers' unlawful termination of the medical, dental, and vision plans; group term life insurance; group term accidental death and dismemberment insurance; long-term disability insurance; and the section 125 plan.

SAMUEL BENT LLC

Thomas J. Morrison, Esq. for the General Counsel.
Wendy M. Bittner, Esq. of Boston, Massachuetts, for the Charging Party.
John V. Woodard, Esq. of Boston, Massachuetts, for Respondent S. Bent & Brothers.
Michael F. Kraemer, Esq., of Philadelphia, Pennsylvania, for Respondent Samuel Bent LLC.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on December 4 and 5, 2000,[1] in Boston, Massachusetts, pursuant to consolidated complaints and notices of hearing (the complaint) issued by the Acting Regional Director for Region 1 of the National Labor Relations Board on September 5. The complaint, based on original and amended charges in the above noted cases filed by International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO (the Charging Party or Union), alleges that S. Bent & Brothers and Samuel Bent LLC, its Successor (Respondent Bent or Bent & Brothers) and Samuel Bent LLC, (Respondent Samuel Bent or Bent LLC), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, Respondent Bent, and Respondent Samuel Bent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Bent was at all material times a corporation up until about February 11, with an office and place of business in Gardner, Massachusetts, engaged in the manufacture and sale of furniture. Respondent Samuel Bent at all times since February 11, is a limited liability company with an office and place of business at the Gardner facility, and has been engaged in the manufacture and sale of furniture. Both Respondent Bent and Respondent Samuel Bent in conducting its business operations purchased and received at the Gardner facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. Both Respondent Bent and Respondent Samuel Bent admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

There is no dispute that on February 11, Respondent Bent ceased all operations on the sale of its assets through a secured party private sale to Respondent Samuel Bent and that on or about May 3, Respondent Bent filed a voluntary petition in the United States bankruptcy court district of Massachusetts pursuant to Chapter 7 of Title11 of the Unites States Code.

The Board, by the General Counsel, filed a motion in United States District Court for the District of Massachusetts, seeking a preliminary injunction under Section 10(j) of the Act ordering Respondent Samuel Bent to recognize and negotiate with the Union. By Memorandum and Order dated August 11, United States District Court Judge Nathaniel M. Gorton denied the relief sought by the General Counsel. Judge Gorton's decision has been appealed to the United States court of appeals for the First Circuit.

At all material times G. L. (Peter) Alcock was the president of Respondent Bent, Diane M. Myntti served as chief financial officer for Respondent Bent and held the position of comptroller for Respondent Samuel Bent, Arcelia A. Miarecki was the director of administration for Respondent Bent and served as the director of human resources for Respondent Samuel Bent, Anthony J. Menegoni was the plant manager for Respondent Bent and served as a manager with Respondent Samuel Bent and Peter Beestrum held the position of vice president/general manager for Respondent Samuel Bent.

B. Facts

Alcock purchased Bent & Brothers in December 1992. At that time the Union represented the production and maintenance employees. Bent & Brothers and the Union were parties to a collective-bargaining agreement dated October 1, 1997, to September 30 (GC Exh. 26 and 27). The parties' agreement contained a number of employees' plans including Medical, Dental, and Vision, Group Term Life Insurance, Group Term Accidental Death & Dismemberment Insurance, Short and Long Term Disability, and a 401 (k) plan.

[1] All dates are in 2000 unless otherwise indicated.

In July 1999, Respondent Bent experienced financial difficulties due to its failure to integrate a new computer system at the Gardner facility and the loss of skilled employees that proved difficult to replace. Alcock explored a number of options to sell the business including contacting a broker. In August 1999, the broker put Eric Hamburg, President of Industrial Renaissance, in touch with Alcock to explore purchasing the business. Hamburg visited the Gardner facility, reviewed present and recent past financial statements, but after serious consideration declined to make an offer to purchase the business.

After receipt of the August 1999 sales figures, that reflected an upturn in business, Alcock forwarded the results to Hamburg. After reviewing those figures, Hamburg expressed a renewed interest in purchasing the business. Alcock submitted a nonbinding agreement to sell the business to Hamburg (GC Exh. 12). By letter dated October 11, 1999, Hamburg submitted a nonbinding letter of intent to acquire the assets of Respondent Bent (GC Exh. 13). The letter of intent contained provisions for a "Due Diligence" investigation of the financial condition and other facets of the business.[2] Additionally, the letter of intent, made clear that Industrial Renaissance would not assume any benefit plans pending at Respondent Bent.

Alcock and Hamburg exchanged numerous documents including an asset purchase agreement. Alcock became discouraged when comparing the revisions to the letter of intent with the provisions contained in the asset purchase agreement, and by letter dated January 6, terminated the letter of intent (GC Exh. 20).

After failing to agree to the sale of the business to Industrial Renaissance, Respondent Bent notified its major creditors, Wells Fargo Business Credit and First International Bank, that it would begin to liquidate the company to pay off most of its debt. Wells Fargo first instructed Respondent Bent to develop a liquidation plan but by letter dated February 2, Wells Fargo demanded that it pay all of its obligations. Wells Fargo notified Respondent Bent that all collateral pledged to it would be sold at a secured party private sale on or after February 8 (GC Exh. 21).

By letter dated February 11 (GC Exh. 22), Industrial Renaissance notified Respondent Bent that Bent LLC, a Delaware limited liability company, has purchased all of its property and assets from Wells Fargo and First International Bank. It also informed Respondent Bent that it has not assumed any liabilities, obligations, or indebtedness of Respondent Bent to any person or entity. The operation of Respondent Bent ceased at the close of business on Friday, February 11. The workforce had been reduced to 50 employees as of that date, the remaining 80 employees having been laid off on January 21 and 28, respectively.

Bent LLC began operations on Monday, February 14.

[2] During the conduct of the "Due Diligence" investigation in December 1999, Hamburg learned that Respondent Bent had a Union that represented its production and maintenance employees, a current collective-bargaining agreement and certain benefit plans in effect. Likewise, Hamburg admitted that in a conversation with Alcock on January 22, he learned that Respondent Bent had terminated its employee Health Plan but that payments were being made to reimburse employees for medical expenses.

A. The 8(a)(1) and (5) Violations

1. Successorship

The General Counsel alleges in paragraph 5 of the complaint in Cases 1–CA–37988 and 1–CA–38328 that since Bent LLC purchased the business of Respondent Bent, and has continued to operate the business at the Gardner facility in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees at Respondent Bent, that Bent LLC has continued the employing entity and is a successor to Respondent Bent.

Bent LLC stipulated to the above facts but did not admit that it was a successor to Respondent Bent.

The Board has held that "[a] mere change in ownership of the employing business enterprise does not itself absolve the new owner from the obligation to recognize and bargain with the labor organization that represented the employees of the former owner." *Premium Foods, Inc.,* 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983). Where there is substantial continuity between the predecessor business and the new employer, and where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by the union, the new employer will be obligated to recognize and bargain with the union representing the predecessor's bargaining unit employees.[3]

In making a "continuity" determination, the Board looks to whether (1) there has been substantial continuity of business operations; (2) the new employer uses the same plant with the same machinery, equipment and production methods; and (3) the same or substantially the same employees are used in the same jobs under the same working conditions and supervisors to produce the same product or provide the same service.[4] This approach is primarily factual in nature and is based on a consideration of the totality of the circumstances in any given situation.

The totality of the circumstances here persuades me that Bent LLC is a successor to Respondent Bent. In this regard, Bent LLC admits that it like Respondent Bent is engaged in the manufacture and sale of furniture at the same Gardner facility, that Bent LLC's initial workforce consisted entirely of individuals employed solely by Respondent Bent, that Bent LLC performs substantially the same services for substantially the same customers, and Bent LLC employees perform the same work using the same equipment.

In sum, I find that there is substantial continuity of business operations between Bent LLC and Respondent Bent. Accordingly, I find that, effective February 11, Bent LLC, as successor to Respondent Bent, was obligated to bargain with the Union. Since Respondent Samuel Bent refused to recognize and bargain with the Union, it violated Section 8(a)(1) and (5) of the Act (R. Samuel Bent Exh. 10).

[3] *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

[4] *Premium Foods, Inc*., 260 NLRB at 714.

2. "Perfectly Clear" Successor

The General Counsel alleges in paragraph 18 of the complaint in Cases 1–CA–37988 and 1–CA–38328 that Respondent Samuel Bent was also a "perfectly clear" successor to Respondent Bent pursuant to *NLRB v. Burns Security Services, supra,* and was therefore, precluded from failing to recognize and bargain with the Union over wages, benefits, and other terms and conditions of employment for employees in the bargaining unit.

In *Burns,* the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which It will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit.

Interpreting the *Burns* "perfectly clear" caveat, the Board, in *Spruce Up Corporation,* 209 NLRB 194 (1974), enfd. per curiam, 529 F. 2d 516 (4th Cir. 1975), ruled that when an employer who has not yet commenced operations announces new terms before or at the same time he invites the previous work force to accept employment under those terms, it cannot be said that the new employer plans to retain all of the employees in the unit, as referred to in *Burns,* since the old employees may choose not to accept employment in that situation. The Board held:

> We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer. . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Thereafter, in *Canteen Company,* 317 NLRB 1052 (1995), enfd. 103 F. 3d 1355 (7th Cir. 1997), the Board found that where a successor employer expressed to the union its desire to have the predecessor employees serve a probationary period, without indication of any changes in employment terms, the new employer "effectively and clearly communicated to the union its plan to retain the predecessor employees" and, since, as of that date it was perfectly clear that the successor planned to keep those employees, it "was not entitled to unilaterally implement new wage rates thereafter."

In applying the above case law to the subject case, the record conclusively establishes that Unit employees were tendered unconditional offers of hire, with no indication that the predecessor's terms would be changed. In this regard, on February 11 after the sale was consummated, Miarecki credibly testified that she was instructed by Beestrum to inform employees that they would be offered the same rate of pay, seniority, and benefits if they commenced employment with Respondent Samuel Bent.

Based on the forgoing, I find that it was "perfectly clear" on February 11, that the Unions' majority status would continue in the work force at the Gardner facility. Accordingly, Respondent Samuel Bent was obligated on and after that date to recognize the Union and to bargain with it prior to setting new terms and conditions of employment.[5]

Consistent with the above discussion, I find that Respondent Samuel Bent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union from February 11, and by unilaterally announcing and implementing unilateral changes in conditions of employment. In this regard, as set forth in paragraph 19 of the complaint, Respondent Samuel Bent unilaterally and without notice to the Union on or about March 1, provided health insurance to Unit employees and on or about May 9, modified vacation policies.

3. Affirmative Defenses

Respondent Samuel Bent, in its answer to Cases 1–CA–37988 and 1–CA–38328, raises as an affirmative defense that it lawfully refused to recognize and bargain with the Union. In this regard, Respondent Samuel Bent asserts that it had a reasonable good faith doubt that the Union did not enjoy the continuing support of a majority of unit employees, pursuant to the United States Supreme Courts holding in *Allentown Mack Sales & Services vs. NLRB,* 522 U.S. 359 (1998). This affirmative defense was enunciated to the Union on March 6 (GC Exh. 30), and again on March 20 (GC Exh. 31). In the letter dated March 20, Beestrum also apprised the Union for the first time, that as an independent and alternative ground, that a minority of the bargaining unit belonged to the Union and paid via check-off.[6] Thus, Beestrum noted this lack of support, especially in a state that does not have a right-to-work law, engenders considerable uncertainty as to whether the majority of the employees support the Union.

Miarecki testified that on the evening of February 11(Friday), she telephoned approximately 8–10 of the team leaders that had worked that day to apprise them that the sale had gone through.[7] Miraecki told the team leaders that she did not know the status of the union but she was authorized to offer them employment with Bent LLC to commence on February 14

[5] The record reflects that the Union on February 15, March 1, and again on March 15, requested that Respondent Samuel Bent recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union (GC Exh. 29 and CP Exh. 1 and 2).

[6] Article 17.2 of the parties' collective-bargaining agreement provides that "No employee shall be required to join the Union or maintain their membership in the Union as a condition of employment." If an employee joined the Union, he/she was required to pay union dues. As of the week ending February 12, 32 percent of the employees were union members (Bent LLC Exh. 8).

[7] On February 11, approximately 50 employees were employed by and working for Respondent Bent. Those employees were scheduled to return to work on February 14, since it had previously been announced that all employees working would continue to do so until the shutdown date on February 25, in the event no sale of the business occurred.

(Monday), at the same rate of pay, seniority and benefits. Between 6 and 8 of the team leaders responded that the status of the Union was not important right now compared with getting their jobs back. One employee noted that he did not care about the Union and another employee stated that he did not need the Union anymore.

In order to contact the approximately 50 employees that were on layoff, Miarecki was assisted on February 12 (Saturday), by former Respondent Bent Plant Manager Menegoni and union representative Bruce Blouin. Of the 13 or so employees that Miarecki reached on Saturday, a few commented that the status of the Union didn't matter right then, it was more important to get their jobs back. None of her contacts that day commented negatively about the Union. Neither Blouin nor Menegoni reported to Miarecki that any of the employees who they contacted said anything negative about the Union.

On February 24, the Union filed a grievance alleging that Respondent Samuel Bent refused to deduct union dues from the paychecks of union members as required by the predecessor's contract. On receipt of the grievance, Miarecki inquired of Beestrum whether she should deduct union dues from employees' paychecks that formerly were on check-off at Respondent Bent. After consideration, Beestrum informed Miarecki to drop the union dues. By letter dated March 6, Beestrum apprised the Union that Bent LLC is not a party to a collective-bargaining agreement with the Union, and is neither obligated by law, nor by contract, to recognize or process this "grievance".

On February 24, when meeting with Beestrum about the grievance, Miarecki apprised him for the first time about the conversations that she had with employees on February 11 and 12. It was based on this discussion that Respondent Samuel Bent developed its affirmative defense that the Union no longer represented a majority of the employees in the Unit.

Based on the above discussion, I am not convinced that Respondent Samuel Bent had a reasonable good faith doubt that the Union no longer represented a majority of the employees at the Gardner facility. In this regard, the statements of 6–8 team leaders that the status of the Union is not important right now in comparison to getting their jobs back cannot, standing alone, support Bent LLC's good faith doubt that the Union lacked the majority support of its employees. In my opinion, it is obvious that employees confronted with the potential of losing their jobs, would first indicate that getting them back and returning to work was of the utmost importance. It is noted that Miarecki, after offering employment to the employees at the same rate of pay, seniority, and benefits, indicated she did not know the status of the Union. Thus, it was natural for any employee to respond that the status of the Union is not important right now when compared to getting their jobs back. In any event, such comments by employees were not negative and were limited to the immediate concern of getting their jobs back. While the statements of two employees were negative about the Union, such statements did not represent the sentiment of the approximately 54 other employees that were contacted. Indeed, since approximately 46 employees did not express any negative comments about the Union, and 6 to 8 employees expressions were limited to getting their jobs back, such evidence does not support a "reasonable good faith doubt" that the Union no longer represents a majority of employees at the Gardner facility.[8] *Scepter Ingot Castings, Inc.,* 331 NLRB No. 153 (2000).

Likewise, I am not convinced that because less then 50 percent of the employees were on dues check-off, such evidence is sufficient support for Respondent Samuel Bent to raise a "reasonable good faith doubt". First, it is axiomatic that the Union is the exclusive representative of all employees in the Unit regardless of whether they are on dues check-off. Second, Respondent Samuel Bent did not independently investigate nor did it submit any evidence regarding whether any of the employees pay union dues by check or cash without use of the dues check-off provisions of the contract. Additionally, it did not present any evidence that employees were not active in discussing conditions of employment with union representatives or did not attend union meetings even if they were not dues paying members.

For all of the above reasons, I am not convinced that Respondent Samuel Bent sufficiently established that the comments made by employees about the Union supported their conclusion that the Union no longer represented the employees in the Unit.

Additional support for the proposition that Respondent Samuel Bent violated Section 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union can be found in the Board's decision in *St. Elizabeth Manor, Inc.,* 329 NLRB No. 36 (1999). The Board held that once a successor's obligation to recognize an incumbent union has attached (where the successor has not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition.[9]

In the subject case, the Union demanded recognition and the right to negotiate, both of which were rejected by Respondent Samuel Bent.[10]

Under these circumstances, Respondent's affirmative defenses are rejected and it must recognize and negotiate with the Union.

---

[8] The Supreme Court stated in *Fall River Dyeing & Finishing Corp. v. NLRB,* 107 S.Ct. 2225, 2234 (1987) that "If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs."

[9] In a successorship situation, the successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. Thus, because the employer's obligation to recognize the union commences at that time, as soon as those two events have occurred, the bar to the processing of a petition or to any other challenge to the union's majority status begins, whether or not the employer has actually extended recognition to the union as of that time.

[10] I also note that the Respondent refused to recognize the Union at a time prior to its learning from Miarecki that certain employees no longer cared about or needed the Union.

4. Unilateral Changes

The General Counsel alleges in paragraph 11 of the complaint in Case 1–CA–37851 that about January 19, Respondent Bent failed to continue in effect all the terms and conditions of the parties' 1999–2000 contract by terminating the employee health and dental plan, and eliminating paid time-off benefits and short-term disability benefits.

In its July 20 answer to the complaint, Respondent Bent admits that on or about January 19, as a result of a third party administrator's cancellation of its contract with Respondent Bent to process medical claims coupled with Respondent Bent's financial condition, it was compelled to terminate its employee welfare plans, including health and dental plans. Respondent Bent argues that any failure to pay paid time-off was the result of intervention by agents of Wells Fargo, its principal lender and the secured party through which Respondent Samuel Bent acquired its assets on February 11.

By letter dated January 19, the Union strongly protested the cancellation of the welfare, health, and dental plans and accused Respondent Bent of breaching the parties' collective-bargaining agreement (GC Exh. 9). On January 20, Respondent posted a Notice to all Employees that as a result of the Company's financial condition it was canceling the Medical Dental and Vision Plan, the Group Term Life Insurance, the Group Term Accidental Death & Dismemberment Insurance Plan, the Long Term Disability Plan and the Section 125 Plan (GC Exh. 10). By letter dated January 24, Respondent Bent responded to the Union and explained that the above actions were taken only after the Company was informed by Health Plans, Inc., the administrator of the Company's health and dental plan, that it intended to cease processing claims or confirm benefits as a result of a dispute over the Company's funding obligations.

There is no dispute that the cancellation of the above noted plans was done unilaterally without advance notice to the Union and without permitting the Union to negotiate over the conduct. Under these circumstances, any defense that Health Plans, Inc., or Wells Fargo caused the cancellation is rejected. In agreement with the General Counsel, Respondent Bent violated Section 8(a)(1) and (5) of the Act when it terminated all of the Employees' Plans set forth in GC Exh. 10. *Specialty Envelope Company,* 321 NLRB 828 (1996).

5. The *Golden State* Successor Issue

The General Counsel alleges in paragraph 4(b) of the complaint in Case 1–CA–37851, that Respondent Samuel Bent before purchasing the assets of Respondent Bent was put on notice of Respondent Bent's potential liability by engaging in a "Due Diligence" search of Respondent Bent's operation. As part of the remedy, the General Counsel seeks an order consistent with the decision in *Golden State Bottling v. NLRB,* 414 U.S. 168 (1973), that Respondent Samuel Bent be jointly and severally liable with Respondent Bent for the unfair labor practices of Respondent Bent.

Liability under *Golden State* normally attaches only if the successor acquires the predecessor's business with the knowledge that the predecessor has committed unfair labor practices. If a successor employer acquires and continues a business with knowledge that the predecessor employer committed unfair labor practices then it may be held jointly and severally liable, with the predecessor, to remedy the unlawful conduct.

Although the General Counsel and the Charging Party sought to extract admissions against interest from Respondent Samuel Bent and Respondent Bent witnesses concerning knowledge of the pending unfair labor practices, I find that these efforts proved unsuccessful for the following reasons.

First, the original charge in Case 1–CA–37851 was filed on January 28 and served on Respondent Bent on January 31 (GC Exh. 1(g)). It must be presumed that Respondent Bent received the unfair labor practice charge sometime in early February 2000. An examination of the charge shows that while Respondent Bent, Wells Fargo Business Credit, Inc. and Sherman Lavallee & Associates are named, Respondent Samuel Bent is not found in the caption or narrative portion of the charge. Alcock testified that on January 19, he apprised Hamburg that Respondent Bent terminated its medical and dental plan but acknowledged that he had no discussions with Hamburg prior to February 11, that such conduct was alleged by the Union to be an unfair labor practice.[11] Second, although Wells Fargo was named in the January 28 unfair labor practice charge, the General Counsel did not present any evidence that representatives of the Bank apprised Hamburg that unfair labor practice charges concerning the termination of employees' medical plans were pending against Respondent Bent. Indeed, Hamburg credibly testified that no representative of the Banks informed him at any time prior to February 11, that Respondent Bent's health plans had been terminated nor that unfair labor practices were filed by the Union concerning the termination of the health insurance plan. Third, both Miarecki and Beestrum credibly testified that they had no discussions with Alcock or Bank officials prior to February 11, about unfair labor practices that had been filed against Respondent Bent. Indeed, Miarecki admitted that she was unfamiliar with unfair labor practices filed with the Board and did not see the January 28 charge at any time prior to the subject hearing. While Beestrum inspected the Gardner facility on February 2, and became aware on February 10, that Respondent Bent did not have a health insurance plan for employees, he credibly testified that it was not until February 15, when he received a letter from the Union that he first learned about the January 28, unfair labor practice charge (CP Exh.1). I also note that during the initial negotiations between Alcock and Hamburg to sell the business, Hamburg included in the Letter of Intent that no benefit plans or liabilities would be assumed (GC Exh. 13). Likewise, in the Bill of Sale negotiated with Wells Fargo and First International it was provided that no liabilities would be acquired when purchasing the assets of Respondent Bent (R. Samuel Bent Exh. 5 and 6).

In sum, when Respondent Samuel Bent purchased the assets from Wells Fargo and First International, it did not know in advance about the unfair labor practices that had been filed by

[11] Alcock further admitted that he did not know what a unfair labor practice was and could not discern the difference between a grievance filed by the Union or a unfair labor practice charge filed with the Board.

the Union against Respondent Bent. Accordingly, I find that Respondent Samuel Bent is not a *Golden State* successor to Respondent Bent and therefore, it is not jointly and severally liable with Respondent Bent for the latter's Section 8(a)(1) and (5) violations. *Navajo Freight Lines, Inc.,* 254 NLRB 1272, 1281 (1981).

CONCLUSIONS OF LAW

1. Respondent Bent and Respondent Samuel Bent have engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees' constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees employed by Respondent Samuel Bent at the Gardner, Massachusetts facility, excluding all other employees, office and clerical employees, firemen and employees of the research and development department, executives, guards and supervisors as defined in the Act.

4. Respondent Bent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by terminating the Medical, Dental, and Vision Plan, Group Term Life Insurance, Group Term Accidental Death & Dismemberment Insurance, Short and Long Term Disability, Paid Time-Off Benefits, and the Section 125 Plan.

5. Respondent Samuel Bent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by unilaterally implementing a health insurance plan and modifying vacation policies.

6. Respondent Samuel Bent is a "perfectly clear" successor to Respondent Bent with respect to the obligations to bargain with the Union representing employees in the above unit.

7. By refusing, on and after February 11, 2000, to recognize and bargain with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO, as the exclusive collective-bargaining representative for employees in the above unit, Respondent Samuel Bent violated Section 8(a)(1) and (5) of the Act.

8. Respondent Samuel Bent is not jointly and severally liable for the unfair labor practices committed by Respondent Bent.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order Respondent Samuel Bent, on request of the Union, to rescind the changes in employment terms made on or about March 1 and May 9, 2000. As to those employment terms (health insurance and vacation policies) for which rescission is requested, Respondent Samuel Bent shall be ordered to make whole all unit employees for any loss of wages and other benefits suffered, as calculated in accordance with *Ogle Protection Service,* 183 NLRB 682, 683, (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent Bent, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Implementing unilateral changes in wages, hours, and other working conditions of employment of employees in the above unit without bargaining with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the unilateral changes in terms and conditions of employment found unlawful and make the employees whole for any loss of earnings and other benefits attributable to its unlawful conduct.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above unit, and embody any understanding reached in a signed agreement.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2000.

---

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent Samuel Bent, Gardner, Massachusetts, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Implementing unilateral changes in wages, hours, and other working conditions of employment of employees in the above unit without bargaining with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the unilateral changes in terms and conditions of employment found unlawful and make the employees whole for any loss of earnings and other benefits attributable to its unlawful conduct.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above unit, and embody any understanding reached in a signed agreement.

(d) Within 14 days after service by the Region, post copies at its Gardner Massachusetts facility of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 2, 2001

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO as the exclusive collective-bargaining representative of employees in the following appropriate unit.

All production and maintenance employees employed by Respondent Samuel Bent at the Gardner, Massachusetts facility, excluding all other employees, office and clerical employees, firemen and employees of the research and development department, executives, guards and supervisors as defined in the Act.

WE WILL, on request of International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO, rescind our unlawful unilateral changes that we made in the terms and conditions of employment of employees in the above unit, and WE WILL make employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

WE WILL, on request bargain collectively and in good faith concerning wags, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above unit, and embody any understanding reached in a signed agreement.

S. BENT & BROTHERS

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgement Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO as the exclusive collective-bargaining representative of employees in the following appropriate unit.

All production and maintenance employees employed by Respondent Samuel Bent at the Gardner, Massachusetts facility, excluding all other employees, office and clerical employees, firemen and employees of the research and development department, executives, guards and supervisors as defined in the Act.

WE WILL, on request of International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, Local 154, AFL–CIO, rescind our unlawful unilateral changes that we made in the terms and conditions of employment of employees in the above unit, and WE WILL make employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

WE WILL, on request bargain collectively and in good faith concerning wags, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above unit, and embody any understanding reached in a signed agreement.

SAMUEL BENT LLC